No. 95-2024

In the Supreme Court of the United States

OCTOBER TERM, 1996

C. MARTIN LAWYER, III, APPELLANT

v.

DEPARTMENT OF JUSTICE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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QUESTIONS PRESENTED

Appellant and others challenged the districting plan for the Florida Senate as a racial gerrymander. The State and all other parties except appellant consented to a modification of the challenged plan, and the district court approved the settlement. The questions presented are:

1. Whether the district court's approval of the proposed plan violated separation of powers or federalism principles.

2. Whether the district court committed clear error in finding that appellant failed to show that District 21 in the proposed plan was predominantly motivated by racial considerations.

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STATEMENT

1. In 1992, in response to the decennial census, the Florida legislature adopted a redistricting plan for the Florida Senate. Pursuant to the procedure for redistricting set forth in the Florida Constitution, Article III, § 16, the Florida Supreme Court approved the redistricting plan. *In re Constitutionality of Senate Joint Resolution 2G*, 597 So. 2d 276 (Fla. 1992). In June 1992, the Attorney General objected to the redistricting plan under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The Attorney General's objection letter noted that the Senate plan divided the politically cohesive minority populations in Tampa and St. Petersburg, and that the information supplied to the Attorney General failed to support the State's assertion that those two areas do not share a

commonality of interest. *In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d 543, 546-547 (Fla. 1992).

After state officials advised the Florida Supreme Court that the legislature would not convene to respond to the Attorney General's objection, the Florida Supreme Court adopted its own plan (Plan 330). 601 So.2d at 544-545. District 21 in Plan 330 was designed to cure the Attorney General's Section 5 objection. District 21 combined areas in four counties: Hillsborough (which contains the City of Tampa), Pinellas (which contains the cities of St. Petersburg and Clearwater), Manatee (which contains the City of Bradenton) and rural Polk. *Id.* at 546. Blacks constituted 50.2% of the population in District 21 and 45% of the voting age population (VAP). J.A. 40. District 21 contained two unusually shaped extensions: A narrow strip on the west end of the district extended north to the City of Clearwater; another narrow band extended from the southern end of Hillsborough County eastward into rural Polk County. Appellant's Br. App. B; J.S. App. D. The Florida Supreme Court noted that District 21 was "more contorted" than other proposals it had considered, and that blacks in Polk County might have little in common with blacks in Hillsborough and Pinellas counties. 601 So.2d at 546. The court concluded, however, that those concerns "must give way to racial and ethnic fairness." *Ibid.*

2. In April 1994, appellant Lawyer and others filed suit against the State of Florida and the United States Department of Justice, alleging that District 21 in Plan 330 was a racial gerrymander that violated the Equal Protection Clause of the Fourteenth Amendment. J.A. 11-15. The complaint alleged that District 21 "was drawn in an irregular fashion in order to ensure that at least fifty one percent (51%) of the population of the district

was comprised of minorities," that it "was drawn specifically to encompass members of minority groups with divergent interests residing in several different communities," and that it "is so irregular that it clearly cannot be understood as anything other than an attempt to segregate the races for purposes of voting." J.A. 13. Appellant sought a declaratory judgment that Plan 330 violates the Equal Protection Clause, an injunction prohibiting the holding of any elections under that plan, and an order requiring the State of Florida to adopt a new redistricting plan that comports with traditional districting principles. J.A. 14.

A three-judge district court was convened. The court permitted intervention by the Florida Senate, Florida's Secretary of State, State Senator Hargrett (the incumbent representative of District 21), and black and Hispanic individuals with an interest in District 21. J.A. 195. Florida's House of Representatives initially appeared as an amicus curiae. J.A. 196. The district court delayed the case pending this Court's decisions in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), and *United States* v. *Hays*, 115 S. Ct. 2431 (1995). J.A. 196.

In July 1995, after *Miller* and *Hays* were decided, the state defendants informed the district court that they did not expect the Florida legislature to convene a special session to draw a new plan. J.A. 196. Counsel for the state Senate suggested that the parties attempt to resolve their differences through mediation. *Ibid.* After hearing comments on that proposal from the other parties, the court concluded that "mediation offered a preferable and feasible alternative to the uncomfortable intervention inherent in federal judicial resolution of issues affecting state government." J.A. 197. At the same time, the court issued an order directing the state appellees to file periodic reports "informing the Court of any formal ac-

tions initiated by any public official or branch of government regarding Florida's senatorial 'reapportionment plan.'" Order dated July 14, 1995 at 5 (R. 78). Mediation resulted in an apparent agreement. J.A. 197. At a hearing to consider the agreement, however, the House and appellant objected to its approval. J.A. 197 n.1. The court then made the House a party and returned the case to the mediator to see if agreement could be reached among all parties. *Ibid.* After further negotiations, all parties except appellant agreed on a plan (Plan 386). That plan contains a significantly revised District 21.

In November 1995, the parties to the agreement filed their proposed settlement. R. 169; J.A. 17. All parties to the settlement agreed that "there is a reasonable factual and legal basis for the plaintiffs' claim." J.A. 17. They further agreed that, if approved by the court, the settlement plan would be used in state elections "unless and until the State of Florida adopts a new plan in accordance with federal and state law." J.A. 19. All parties to the agreement "manifested both the authority to consent and actual consent to the terms of the proposed resolution." J.A. 197; 11/2/95 Tr. 23-25.

Because all parties, including appellant, sought to replace Plan 330 with a new plan, the district court determined that there was no need to conduct a proceeding on liability. J.A. 197-198. Instead, the court concluded that it could proceed directly to the remedial phase of the case. A notice that there would be a remedial hearing was published in 13 area newspapers, and the details of the proposed plan were available for review in the clerk's office. J.A. 161, 198. Before the hearing, the Department of Justice precleared Plan 386 under Section 5. Joint Motion to Approve Settlement, Attachment B (R. 185).

3. a. The remedial hearing was held on November 20, 1995. At the hearing, the parties supporting Plan 386 submitted evidence concerning the factors that were taken into consideration in the drawing of District 21. That evidence established the following:

Proposed District 21 is located entirely in the Tampa Bay region, and includes portions of Hillsborough, Pinellas, and Manatee counties. It eliminates the Clearwater and Polk County extensions that had been included in previous District 21. J.A. 25. With those portions of the district excised, District 21 is similar in shape to numerous other Florida House and Senate districts. J.A. 26, 60-75. Proposed District 21 is also far more compact than previous District 21. It has an end-to-end distance of 50 miles. Only 15 out of 40 Senate districts cover less distance end-to-end. J.A. 25-26.

The proposed plan satisfies one-person, one vote requirements. J.A. 28. The most populous district has a deviation of +1.2%, and the least populous district has a deviation of -.04%. *Ibid.*

Although District 21 crosses Tampa Bay in the vicinity of the Sunshine Skyway Bridge, the Florida Supreme Court has held that districts that cross bodies of water comply with Florida's contiguous territory requirement. J.A. 28 (citing *In re Constitutionality of Senate Joint Resolution 2G*, 597 So. 2d 276, 279 (Fla. 1992)). Several Senate districts cross water, including districts that are not linked by bridges. J.A. 28, 81-83.

Crossing county lines to create House and Senate districts is common in Florida. J.A. 32-33. In Plan 330, for example, 19 Senate districts out of 40 contained parts of three or more counties. J.A. 45. Many Senators in Florida believe that having multiple representatives in the Senate provides counties with better representation, and

county boundaries are often split for that reason. J.A. 32 & n.7.

Residents of proposed District 21 share a community of interest. More than 95% of the residents of proposed District 21 live in an urban area. J.A. 31. The residents of the district—both black and white—also share common socioeconomic characteristics that are distinct from the communities surrounding those districts. J.A. 30-31. In median family income, per-capita income, and family income below the poverty level, District 21 is the poorest of the nine districts in the Tampa Bay region, and is among the three poorest districts in the State. J.A. 49. That demographic profile cannot be explained by the correlation between race and socio-economic status. In terms of per-capita income, for example, District 21 contains the poorest white population in the State. J.A. 30.

Residents throughout proposed District 21 share an interest in the economic development of the Tampa Bay region, particularly in the growth of tourism, professional sports, and new hotel and motel construction—and in obtaining a fair share of the benefits that expansion will produce. J.A. 153-154. Crime prevention, especially juvenile crime, is a problem throughout the Tampa Bay region, and programs to combat juvenile crime, such as "Hands Across the Bay," involve residents of both Tampa and St. Petersburg. J.A. 150. Tampa and St. Petersburg face a similar AIDS crisis, and share an interest in developing community-based programs to assist victims of the crisis. J.A. 153.

Plan 386 minimizes disruption to the electoral process. Senators are elected to four-year staggered terms, with elections in odd-numbered districts in 1996 and elections in even-numbered districts scheduled for 1998. Under Florida law, out-of-cycle elections are required when a substantial number of people would otherwise be de-

prived of an opportunity to vote as scheduled. By minimizing the number of people moved from odd-numbered districts to even-numbered districts, Plan 386 avoids the need for the State to hold out-of-cycle elections. J.A. 28-29. Plan 386 also preserves the balance between Democrats and Republicans in the Senate. J.A. 31.

Under the proposed plan, the black population in District 21 is reduced from 50.2% to 41.2%, J.A. 40, and the black VAP is reduced from 45% to 36.2%, J.A. 31. Given current voting patterns, members of all racial groups in District 21 would have a reasonable opportunity to elect a candidate of their choice. J.A. 31, 129-133. In contrast, reducing the percentage of blacks in the district to 23% (as proposed by appellant) would eliminate any significant opportunity for blacks to elect a candidate of their choice. J.A. 131-132.

b. Appellant objected to proposed Plan 386, claiming that the decision to include parts of Manatee and Pinellas counties in District 21 was dominated by racial considerations. To support that claim, appellant relied almost entirely on statistics showing that the percentage of blacks in District 21 was higher than the percentage of blacks in Hillsborough, Pinellas, and Manatee counties. J.A. 177-178; see also J.S. App. 26a-28a. Appellant also offered his own remedial plan. District 21 in that plan was entirely contained in Hillsborough County; it contained two narrow, winding extensions into the central part of Hillsborough County; and it had a 23% black VAP. J.S. App. 22a; J.A. 40, 57.

Although the court told appellant that "[y]ou are free to put on any evidence that you have that race was the deciding factor in the fashioning of plan 386," J.A. 185, appellant declined to call any witnesses after the court refused to let him question a Justice Department lawyer

who had participated in the negotiations, J.A. 186-187.[1] Appellant chose not to examine John Guthrie, the state employee involved in the mechanics of drawing the plan, or any other state officials involved in negotiating the proposed remedy. J.A. 25, 171-172. Other than appellant, the only person to object to the plan was a former state senator who is not a party to the case and who presented no evidence to support her objection. J.A. 188-190.

4. On March 19, 1996, the district court entered an order approving the settlement. J.A. 195-209. The effect of that order is to prevent state Senate elections from being held under Plan 330 and to require such elections to be held under Plan 386 unless and until the State adopts a new plan in accordance with state and federal law. J.A. 18-19.

The court first held that it was not necessary to find existing District 21 unconstitutional in order to approve the settlement. The court recognized that a federal court must avoid being manipulated by parties "contriving" to settle a case. J.A. 199 n.2. At the same time, the court explained, a State should not be deprived of the opportunity to avert "an expensive and protracted contest and the possibility of an adverse and disruptive adjudication." J.A. 199. The court concluded that those dual interests are best served by ensuring that there is a substantial "evidentiary and legal" basis for a plaintiff's

[1] Although appellant claimed that the Department lawyer (Steven Mulroy) had indicated to him that race was the overriding factor in drawing Plan 386, J.A. 184, Mulroy stated that he "never said at any point during confidential mediation sessions or otherwise that race was the overriding factor in the configuration of District 21 and plan 386," J.A. 193. The district court ruled that Mulroy's testimony would not assist the court in resolving the issue before it, J.A. 186-187, and appellant has not appealed from that ruling.

claim before a settlement displacing state law is approved. *Ibid.* The court found that standard was readily satisfied, noting that "[e]ach party either states unequivocally that existing District 21 is unconstitutionally configured or concedes, for purposes of settlement, that the plaintiffs have established *prima facie* unconstitutionality." J.A. 201 n.3. The court further found that "the boundaries of current District 21 are markedly uneven and, in some respects, extraordinary," J.A. 202, and that the district "bears at least some of the conspicuous signs of a racially conscious contrivance," J.A. 205.

The court then considered whether revised District 21 was constitutional. Applying the *Miller* standard, the court found it "obvious that a cognizable, constitutional objection to the proposed District 21 is not established." J.A. 205. The court found that the plan had produced only two dissenters, appellant and a former state senator, and that they had offered neither "relevant evidence" nor "germane legal argument." *Ibid.* The court found that "[i]n its shape and composition, proposed District 21 is, all said and done, demonstrably benign and satisfactorily tidy, especially given the prevailing geography." *Ibid.* The court found that "[b]oth common sense and the history of this litigation suggest that the residents of District 21 regard themselves as a community." J.A. 206. And the court found that Plan 386 was not designed to achieve a particular electoral outcome, but instead "offers to any candidate, without regard to race, the opportunity to seek elective office and * * * a fair chance to win." J.A. 207.

Because the President of the Florida Senate and the Speaker of the Florida House of Representatives had consented to Plan 386, the court viewed the plan as "primarily a legislative action." J.A. 206. The court concluded that it was required to defer to the legisla-

ture's judgment about the wisdom of Plan 386 "absent a constitutional infirmity." J.A. 207. Finding that Plan 386 "passes any pertinent test of constitutionality," the court approved that plan. *Ibid.*

Judge Tjoflat, in a special concurrence, agreed that the proposed plan is constitutional. J.A. 208-209. Judge Tjoflat concluded, however, that the proposed remedy could not be approved without a judicial determination that the original plan is unconstitutional. J.A. 209. Because he concluded that the evidence established that "District 21 is the product of racial gerrymandering in violation of the Equal Protection Clause," Judge Tjoflat agreed with the majority that the court could approve the proposed settlement plan. *Ibid.*

SUMMARY OF ARGUMENT

I. A. The district court correctly concluded that it was not required to find the existing plan unconstitutional before approving the settlement plan. The State consented to a modification of the existing plan, and there was a strong factual basis for the claim that District 21 in the existing plan was predominantly motivated by race. In those circumstances, the district court could resolve the issue of liability through consent, rather than through a formal adjudication. Like all other federal court litigants, States have a right to avoid the time and expense of trial and to consent to liability without admitting guilt.

The district court's resolution of the issue of liability through consent, rather than through a formal adjudication, did not harm appellant in any way. In his complaint, appellant sought the elimination of District 21 in the existing plan. By disposing of the issue of liability through consent, the district court satisfied that request.

B. The district court did not preempt the redistricting role of the Florida legislature. The district court gave the state legislature every opportunity to formally enact a new redistricting plan. The Florida House and the Florida Senate, however, decided to use their roles as parties to the present litigation to propose a new plan that would remain in place unless and until the legislature formally enacted a new plan. The district court appropriately deferred to that legislative choice.

The district court also did not intrude on the redistricting role of the Florida Supreme Court. There was no redistricting action pending in the Florida Supreme Court. And the district court did not issue any order that would have prevented appellant or anyone else from initiating such a redistricting proceeding.

II. The district court's finding that appellant failed to prove that race predominated in the drawing of proposed District 21 is not clearly erroneous. The district court's subsidiary findings that District 21's geographical characteristics do not trigger suspicion, that District 21 includes a community of interest, and that District 21 offers persons of all races an opportunity to win elective office are all supported by the record, and together justify the district court's finding that appellant failed to prove his claim.

Appellant's reliance on *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), *Shaw* v. *Hunt*, 116 S. Ct. 1894 (1996), and *Bush* v. *Vera*, 116 S. Ct. 1941 (1996), is misplaced. Those cases involved proof of glaring departures from traditional and customary districting principles that had obvious racial consequences and direct evidence or a concession that those departures were motivated by a fixed intent to create a majority-minority district. Neither of those factors is present here.

Finally, appellant invites the Court to make its own independent assessment of the evidence in the case. The relevant inquiry, however, is whether the district court's findings are clearly erroneous. Because appellant has fallen far short of showing that they are, the district court's judgment should be affirmed.

ARGUMENT

Appellant contends (Br. 21-34) that the district court's approval of the settlement plan violated principles of federalism in two respects: First, he contends (Br. 27) that the court lacked authority to modify the existing plan without first finding it unconstitutional. Second, he contends (Br. 32-33) that the court improperly prevented the Florida legislature and the Florida Supreme Court from devising a new redistricting plan. Appellant also contends (Br. 34-47) that the district court erred in finding District 21 in the proposed plan constitutional. Appellant's contentions are all without merit.

I. THE DISTRICT COURT'S APPROVAL OF THE SETTLEMENT PLAN DID NOT VIOLATE PRINCIPLES OF FEDERALISM

A. The District Court Was Not Required To Find Plan 330 Unconstitutional Before Approving The Settlement Plan

1. When a claim is made that a State's redistricting plan is unconstitutional, and the State chooses to defend the constitutionality of its plan, "a federal court's equitable remedial power is not triggered unless there has been an adjudication that the apportionment in place is unconstitutional" (Br. 23). The situation is different, however, when, as here, the State consents to a modification of its redistricting plan. The State's consent draws into play the principles applicable to consent decrees.

One of the principal purposes of a consent decree is to avoid a judicial determination of the merits of the claim. As this Court has explained, when parties enter into a consent decree, they "waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation." *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971). That feature of consent decrees does not preclude federal courts from approving them. The parties' agreement itself "serves as the source of the court's authority to enter [a] judgment." *Local Number 93, Int'l Firefighters* v. *City of Cleveland*, 478 U.S. 501, 522 (1986).

That does not mean that a federal court may simply rubber-stamp a consent decree without any inquiry into the underlying merits of the dispute. A federal court is not "a recorder of contracts from whom parties can purchase injunctions." 478 U.S. at 525 (internal quotation marks omitted). In order to preserve its judicial role, a court must satisfy itself that the decree "com[es] within the general scope of the case made by the pleadings," and that it "further[s] the objectives of the law upon which the complaint was based." *Ibid.* The court has no authority, much less an obligation, however, to fully adjudicate the merits of the dispute that gave rise to the decree. *Ibid.* See also *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992).

As the district court recognized, when the underlying dispute involves a challenge to a state law, a court must exercise special care to ensure that it does not become an unwitting accomplice to friendly lawsuits designed to achieve "narrow political interests." J.A. 199 n.2. To allay that concern, a court may properly demand that plaintiffs demonstrate a factual basis for their claim. Cf. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 290-291 (1986) (O'Connor, J., concurring in part and concurring

in the judgment). The court should also take steps to ensure that the state parties before it have authority to settle the case on behalf of the State. It would disserve the very federalism values appellant seeks to champion, however, to require States in every case to litigate disputed charges to the bitter end. Absent a specific congressional or state law directive to the contrary, States faced with serious charges of illegality should have the same opportunity as all other federal court litigants to avoid the time and expense of trials and to consent to liability without admitting guilt.

2. Under the correct legal principles, it was appropriate to permit the State to consent to liability in this case. In adopting District 21 in Plan 330, the Florida Supreme Court acknowledged that District 21's boundaries were "contorted," and that "fingers" were extended "in order to include pockets of minority voters." *In re Constitutionality of Senate Joint Resolution 2G*, 601 So.2d at 546. The Florida Supreme Court also stated that, while Polk County voters might have little in common with voters in Hillsborough and Pinellas counties, "community of interest must give way to racial and ethnic fairness." *Ibid.* There was therefore a strong factual basis for the claim that District 21 in the Florida Supreme Court's plan was predominantly motivated by racial considerations. The district court also determined that the parties before it had authority to represent the State's interest in litigation, J.A. 197, 206, and appellant does not challenge that state law determination, Br. 32. See also Fla. Stat. Ann. § 16.01 (West Supp. 1997) (Attorney General has traditional authority to conduct litigation on behalf of the State); *Florida ex rel. Shevin* v. *Exxon Corp.*, 526 F.2d 266, 268-269 (5th Cir.) (Attorney General may exercise such authority on behalf of the State as the public interest requires), cert. denied, 429 U.S. 829 (1976);

Abramson v. *Florida Psychological Ass'n*, 634 So. 2d 610, 612 (Fla. 1994) (state agency may agree to settlement that displaces state law when the settlement is in the public interest). In those circumstances, the district court correctly concluded that it could dispose of the issue of liability through consent and proceed directly to the remedial phase of the case.[2]

3. That conclusion is not affected by the fact that appellant objected to the issue of liability being resolved by consent and insisted upon a formal adjudication of liability. One party to a dispute does not have the power to block the other parties from resolving an issue through consent. *Local Number 93*, 478 U.S. at 528-529. And while a court may not resolve an issue by consent in such a way as to prevent a nonconsenting party from vindicating his substantive rights, *ibid.*, that did not happen here. Appellant expressly adopted the following Statement of the Case:

> As a result of the Supreme Court's decision in the *Miller* case, there are no issues of law to be decided by the Court in this matter. The instant action is directly analogous to, and therefore controlled by, the

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[2] The court of appeals decisions relied upon by appellant involved circumstances very different from those present here. In *LULAC* v. *Clements*, 999 F.2d 831, 840 (1993), cert. denied, 510 U.S. 1071 (1994), the Fifth Circuit held that the Texas Attorney General did not have authority under Texas law to bind the State to a settlement altering state law over the objection of state defendants whom he represented. Here, both chambers of the Florida legislature support the Attorney General's position. In *Perkins* v. *City of Chicago Heights*, 47 F.3d 212, 216-217 (1995), the Seventh Circuit held that a local unit of government could not consent to a modification of state law. Here, the State through its authorized representatives consented to a modification of one of its own laws. The decisions in *LULAC* and *Perkins* are therefore inapposite here.

Miller opinion. *Accordingly, the only issue which should remain for the Court to decide at the trial on this matter is the issue of the appropriate remedy.*

J.A. 197-198 (emphasis in opinion). In addition, in his complaint, appellant sought the elimination of District 21 in Plan 330. J.A. 11-14. By disposing of the issue of liability through consent, the district court satisfied that request.

The court's determination of liability through consent, rather than through formal adjudication, therefore did not adversely affect appellant in any way. Indeed, that aspect of the court's decision actually benefitted appellant, because it spared him the expense and delay of a trial and the risk that he might not prevail on his claim. In those circumstances, appellant had no right to insist upon a formal adjudication of liability. The district court was free to resolve that issue through consent and to proceed directly to the remedial phase of the case.

B. The District Court Respected The State's Redistricting Prerogatives

1. The principles that govern a federal court's exercise of remedial authority in redistricting cases are well established. Redistricting "is a legislative task which the federal courts should make every effort not to preempt." *Wise* v. *Lipscomb*, 437 U.S. 535, 539 (1978). When a federal court finds an existing districting plan unconstitutional or disposes of that issue by consent, "it is therefore, appropriate, whenever practical, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Id.* at 540. At the same time, "when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so," a federal court must "devise and impose a reapportionment plan pending later legislative action." *Ibid.*

The district court in this case complied with those established limits on federal court remedial authority. While appellant asserts that the district court preempted legislative action (Br. 32), the history of the litigation demonstrates otherwise. Following this Court's decision in *Miller*, the district court specifically inquired whether the state legislature would devise a new redistricting plan. When responsible state officials informed the court that the legislature was unlikely to act, the court approved the state Senate's request for mediation. J.A. 196-197. The court's order approving mediation did not preclude the legislature from convening and preempting the mediation process. Indeed, the court required the State to file periodic status reports on the prospect of legislative action. Order dated July 14, 1995 at 5 (R. 78). With no legislative action forthcoming, state officials devised the settlement plan, and the authorized representatives of the Florida House, the Florida Senate, and the State of Florida consented to its adoption. J.A. 197. The settlement itself did not prevent the legislature from formally enacting a different plan. Under the agreement, the plan approved by the court was to be used only "unless and until the State of Florida adopts a new plan in accordance with federal and state law." J.A. 19.

The state legislature therefore had every opportunity formally to enact a new redistricting plan; it simply failed to avail itself of that opportunity. Instead, the Florida House and the Florida Senate chose to use their status as parties to pending litigation to propose a new redistricting plan that would remain in effect unless and until the legislature formally enacted a different plan.

The district court acted appropriately in deferring to that legislative choice.

2. This Court has held that the principle of deference to state redistricting authorities extends to state courts as well as state legislative bodies, and that a federal court must therefore "neither affirmatively obstruct" a pending state court redistricting action "nor permit federal litigation to be used to impede it." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993). That principle of federal court deference to pending state court proceedings, however, has no application here. During the course of the federal court action, there was no redistricting proceeding pending before the Florida Supreme Court. Nor did the district court issue any order that would have prevented appellant or any other party from attempting to initiate such a redistricting proceeding. There is therefore no basis for appellant's claim (Br. 32-33) that the district court improperly preempted the redistricting role of the Florida Supreme Court.

3. Appellant's argument that the district court violated the established limits on federal equitable authority is not assisted by his reliance (Br. 32-33) on Article III, Section 16 of the Florida Constitution. Appellant did not assert in the district court that Article III had any bearing on the court's authority to approve the settlement in this case, and the district court therefore did not address the meaning or relevance of that provision. It would be inappropriate for this Court to decide that state law question in the first instance.

In any event, by its terms, Article III governs only decennial redistricting in response to a new census. Fla. Const. Art. III, § 16(a) ("The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state [Senate and House]."); see also Appellant's Br. App. 1a. Consistent with the plain language of the provision, both the Senate and the House informed the district court below that Article III does not address what procedures should be followed if the legislature has already enacted a post-decennial redistricting plan and there is a need to redistrict again before the next decennial census. 7/6/95 Tr. 28-33. Appellant has offered no basis for reaching a different conclusion about the meaning of that provision.

II. THE DISTRICT COURT'S FINDING THAT APPELLANT FAILED TO SHOW THAT RACE PREDOMINATED IN THE DRAWING OF PROPOSED DISTRICT 21 IS NOT CLEARLY ERRONEOUS

A district court's review of a challenge to a State's redistricting plan must begin with a presumption that the State has acted in good faith compliance with constitutional standards. *Miller* v. *Johnson*, 115 S. Ct. 2475, 2488 (1995). To overcome the presumption of good faith and to trigger strict scrutiny, it is not enough for a claimant to show that race was one of several factors animating the drawing of a district's boundaries. *Bush* v. *Vera*, 116 S. Ct. 1941, 1950 (1996) (plurality opinion). For strict scrutiny to apply, there must be a showing that race was the "predominant factor" motivating the State's redistricting decision. *Miller*, 115 S. Ct. at 2488; see also *Shaw* v. *Hunt*, 116 S. Ct. 1894, 1900 (1996) ("The Constitutional wrong occurs when race becomes the 'dominant and controlling' consideration."). To meet that burden, a person challenging a State's plan must establish that the State "subordinated traditional districting principles to race." *Miller*, 115 S. Ct. at 2490.

Applying those principles, the district court found that appellant failed to show that race predominated in the drawing of proposed District 21. J.A. 205. That finding

is entitled to deference on appeal and may be reversed only if it is clearly erroneous. *Miller*, 115 S. Ct. at 2488. Appellant has fallen far short of demonstrating clear error here.

A. The District Court's Subsidiary Findings Support The Conclusion That Race Did Not Predominate In The Design of Proposed District 21

The district court's rejection of appellant's claim of predominant motive is based on three key subsidiary findings. Those subsidiary findings are supported by the record and together justify the district court's finding that appellant failed to prove his claim.

First, the court found that "[i]n its shape and composition, proposed District 21 is, all said and done, demonstrably benign and satisfactorily tidy, especially given the prevailing geography." J.A. 205. The evidence in the record supports that finding. Proposed District 21 is located entirely in the Tampa Bay region and primarily follows Tampa Bay. It has an end-to-end distance of only 50 miles, J.A. 25-26, and is similar in shape to numerous other Florida House and Senate districts, J.A. 26, 60-75. Although District 21 crosses Tampa Bay in the vicinity of the Sunshine Skyway Bridge, several other House and Senate districts cross bodies of water, and the Florida Supreme Court has held that such districts satisfy Florida's contiguity requirement. J.A. 28, 81-83. Like other House and Senate districts, District 21 includes portions of three counties, a practice that is supported by the race-neutral goal of increasing the number of representatives for each county. J.A. 32-33 & n.7. Thus, the district court reasonably determined that, in terms of compactness, shape, contiguity, and relationship to political boundaries, District 21 is sufficiently consistent with the

State's redistricting practices to negate any inference that District 21 is predominantly race-based.

Second, the district court found that "[b]oth common sense and the history of this litigation suggest that the residents of District 21 regard themselves as a community." J.A. 206. That finding is also fully supported by the record. More than 95% of the residents of proposed District 21 live in an urban area, J.A. 31, and the residents in the proposed district share socioeconomic characteristics that are distinct from the communities surrounding the district, J.A. 30-31. District 21 is the poorest of the nine districts in the Tampa Bay region and among the poorest districts in the State. J.A. 49. That depressed economic status is not explained by the correlation between race and socio-economic status: The whites in the district are extremely poor as well. J.A. 30. Residents throughout proposed District 21 share a common interest in the economic development of the Tampa Bay region, crime prevention, and the AIDS crisis. J.A. 150, 153-154. The district court therefore reasonably found that District 21 is composed of "communities defined by actual shared interests," *Miller*, 115 S. Ct. at 2488, a finding that provides strong support for the conclusion that District 21 is not predominantly race-based.

Finally, the district court found that District 21 "offers to any candidate, without regard to race, the opportunity to seek elective office and * * * a fair chance to win." J.A. 207. The record supports that finding as well. Under the proposed plan, the black VAP in District 21 is only 36.2%. J.A. 31. Given current voting patterns, members of all racial groups in District 21 would have a reasonable opportunity to elect a candidate of their choice. J.A. 31, 129-133. The racial composition of District 21 and the court's finding that members of all racial groups have an equal opportunity to be elected in

that district reinforce the conclusion that racial considerations did not dominate the design of the district.[3]

B. *Miller*, *Shaw*, and *Vera* Do Not Support Appellant's Claim

In seeking to overturn the district court's finding that he failed to prove his claim of predominant motive, appellant relies (Br. 35-39) on this Court's decisions in *Miller*, *Shaw*, and *Vera*. For several reasons, appellant's reliance on those cases is misplaced.

To begin with, the district courts in those three cases all found that race had played a sufficient role in the design of the districts to warrant strict scrutiny. *Miller*, 115 S. Ct. at 2484; *Shaw*, 116 S. Ct. at 1900; *Vera*, 116 S. Ct. at 1951. In this case, by contrast, the district court found that race was not the predominant motive in the district's design. Because district court findings on the issue of predominant motive are reviewed under the clearly erroneous standard, that distinction is significant.

In addition, the plans at issue in *Miller*, *Shaw*, and *Vera* were all adopted prior to the time that this Court made clear that districts would be subjected to strict scrutiny if they were predominantly motivated by race. In contrast, the plan at issue in this case was adopted after *Miller* in a conscious and conscientious effort to comply with the constitutional standards established in that decision. The presumption that a State has acted consistently with constitutional standards operates with

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[3] Other evidence provides additional support for the district court's finding that race did not predominate in the design of proposed District 21. Besides the factors already discussed, the design of proposed District 21 was affected by the need to satisfy one-person, one-vote requirements, J.A. 28, the desire to avoid out-of-cycle elections, J.A. 28-29, and the desire to retain the existing partisan balance in the state Senate, J.A. 31.

much stronger force when the State has acted with knowledge of those standards.

Most important, *Miller*, *Shaw*, and *Vera* all contained compelling evidence of predominant racial motive not present here. In *Miller*, it was "exceedingly obvious" from the shape of the district and demographic information that "narrow land bridges" were drawn to "outlying appendages containing nearly 80% of the district's total black population" in "a deliberate attempt to bring black populations into the district." 115 S. Ct. at 2488-2489. The State had also conceded that the district was a "product of a desire by the General Assembly to create a majority black district." *Id.* at 2489. The State's Attorney General had acknowledged that the creation of such a district would "violate all reasonable standards of compactness and contiguity." *Id.* at 2489-2490. And a comprehensive report had demonstrated "the fractured political, social, and economic interests" within the district's black population. *Id.* at 2490.

In *Shaw*, the shape of the district was "highly irregular and geographically non-compact by any objective standard that can be conceived." 116 S. Ct. at 1901. In fact, the district "ha[d] been dubbed the least geographically compact district in the Nation." *Ibid.* There was also "direct evidence" that the State's "overriding purpose" was "to create two congressional districts with effective black voting majorities" and that other considerations "came into play only after the race-based decision had been made." *Ibid.* (emphasis omitted).

In *Vera*, the districts at issue "had no integrity in terms of traditional, neutral redistricting criteria." 116 S. Ct. at 1952. There was "direct evidence" that the State had made a commitment "at the outset of the process" to create majority-minority districts. *Id.* at 1953. And there was evidence that the State had used "block-

by-block racial data" to make "more intricate refinements" in district lines "on the basis of race than on the basis of other demographic information." *Ibid.*

While there are some significant differences in the kind of proof submitted in *Miller*, *Shaw*, and *Vera*, the finding of predominant racial motive in all three cases ultimately turned on two critical factors: (1) significant departures from traditional and customary districting principles that had obvious racial consequences; and (2) direct evidence or a concession that those departures were based on a fixed intent to create a majority-minority district. Neither of those factors is present here.[4]

C. Appellant's Remaining Contentions Do Not Provide A Basis For Overturning The District Court's Finding That Race Did Not Predominate In The Drawing Of Proposed District 21

1. Appellant contends (Br. 35) that the district court did not conduct an independent constitutional review of Plan 386, but approved it only because it was the choice of the legislature. Appellant has misread the district court's decision. The district court quoted the controlling constitutional standard from *Miller* (J.A. 202-203); it explained that, under *Miller*, the relevant inquiry is whether a districting decision is "motivated and dominated by a single-minded focus on * * * race" (J.A. 205); and it found "that a cognizable, constitutional objection to the proposed District 21 is not established" (*ibid.*).

[4] Appellant's claim (Br. 34, 46) that he was deprived of the opportunity to introduce direct evidence of predominant racial motive is incorrect. Appellant had the right to participate in the mediation process that led to the adoption of Plan 386, and the district court permitted appellant to examine any state official involved in the drawing of District 21's boundaries. J.A. 185-188.

Appellant's view that the district court approved Plan 386 only because it was proposed by the legislature is based on the court's statement that it approached its task with "sincere deference to legislative discretion" (J.A. 206) as well the court's statement that it had conducted a "limited review" (J.A. 207). Appellant has taken those statements out of context. The first statement appears at the end of a paragraph in which the court explained that "the limited role of a federal court is to ascertain whether the legislatively described district is among that boundless number of possible and constitutional districts and not among the equally boundless number of possible and unconstitutional districts." J.A. 206. The second statement appears immediately after a paragraph making a similar point: that the legislature's view about the "wisdom" of a plan is controlling and that the court's limited role is to determine whether the plan has "a constitutional infirmity." J.A. 207. Both are correct statements of the legal standards governing judicial review of a State's redistricting plan.

2. Appellant also attempts to show (Br. 40-47) that the evidence in the record establishes that District 21 was predominantly motivated by racial considerations. We have already discussed most of the evidence cited by appellant. In essence, appellant invites the Court to conduct its own independent analysis on compactness, shape, contiguity, relationship to political subdivisions, and communities of interest, and to reach different conclusions from those reached by the district court. The relevant inquiry, however, is whether the district court's findings on those issues are clearly erroneous. And, as we have shown, they are not.

3. In addition to the evidence already discussed, appellant relies (Br. 41-42) on statistics showing that the percentage of black voters in proposed District 21 is sig-

nificantly higher than the percentage of black voters in Hillsborough, Manatee, and Pinellas counties. Given existing patterns of racial segregation and the likelihood that a district comprised of poor urban residents will also include many minority residents, however, it is not surprising that the percentage of blacks in District 21 is higher than the percentage of blacks in the three counties as a whole. The district court therefore reasonably concluded that appellant's statistical evidence did not constitute proof that race predominated in the drawing of proposed District 21.

Appellant's theory that a district is constitutionally suspect unless the percentage of blacks in the district roughly approximates the percentage of blacks in the counties which it incorporates also leads to illogical consequences. Under that theory, unless blacks are spread evenly throughout the counties included in a district, a State would be required to engage in the very kind of race-based districting to which appellant objects. Appellant's theory would also require the application of strict scrutiny to the Hillsborough County district he proposed, since the percentage of blacks in that district (23%) is significantly higher than the percentage of blacks in Hillsborough County (11%). J.S. App. 23a; J.A. 40.

In sum, the district court reasonably determined that District 21 includes a reasonably compact community of interest within the Tampa Bay area. There is nothing constitutionally suspect about drawing such a district. See *Miller*, 115 S. Ct. at 2490 (State "is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests").

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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